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Nos. 97-1184 and 97-1243

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.* (Supp. II 1996), requires a federal agency employer to bargain, during negotiation of a collective bargaining agreement, over a proposal that would bind the agency to negotiate over union-initiated proposals offered during the term of the agreement.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Department of Energy, 51 F.L.R.A. 124 (1995)	6
Department of Energy v. *FLRA*, 106 F.3d 1158 (4th Cir. 1997) (*DOE*)	5, 6, 7
Department of the Navy v. *FLRA*, 962 F.2d 48 (D.C. Cir. 1992)	11
HHS v. *FLRA*, 844 F.2d 1087 (4th Cir. 1988)	3, 13
Indiana Air Nat'l Guard v. *FLRA*, 712 F.2d 1187 (7th Cir. 1983)	13
Internal Revenue Serv. v. *National Treasury Employees Union*, 17 F.L.R.A. 731 (1985)	3, 4
Internal Revenue Serv. v. *National Treasury Employees Union*, 29 F.L.R.A. 162 (1987)	4, 11
Marine Corps Logistics Base, Barstow, Cal., 39 F.L.R.A. 1126 (1991)	11
National Treasury Employees Union v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU*)	*passim*
Social Security Admin. v. *FLRA*, 956 F.2d 1280 (4th Cir. 1992) (*SSA*)	*passim*

Statutes:

Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.* (Supp. II 1996)	2
5 U.S.C. 7105(a)(2)(G)	2
5 U.S.C. 7106(b)(2)	12
5 U.S.C. 7106(b)(3)	12

Statutes—Continued: Page

5 U.S.C. 7114(a)(4) 2
5 U.S.C. 7114(c) 6
5 U.S.C. 7116(a)(1) 7
5 U.S.C. 7116(a)(5) 2, 7
5 U.S.C. 7116(b)(5) 2
5 U.S.C. 7117(a)(1) 2
5 U.S.C. 7118(a)(6) 2
5 U.S.C. 7119 3
5 U.S.C. 7119(c)(5)(B) 3
5 U.S.C. 7119(c)(5)(C) 3
5 U.S.C. 7123(a) 3
National Labor Relations Act, 29 U.S.C. 158(d) 12

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OPINIONS BELOW

The opinion of the court of appeals (FLRA Pet. App. 1a-12a; NFFE Pet. App. 1a-10a) is reported at 132 F.3d 157. The opinion of the Federal Labor Relations Authority (FLRA Pet. App. 13a-26a; NFFE Pet. App. 11a-23a) is reported at 52 F.L.R.A. 475.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1997. The National Federation of Federal Employees filed a petition for a writ of certiorari on January 15, 1998, and the Federal Labor Relations Authority filed a petition for a writ of certiorari on January 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.* (Supp. II 1996), are reproduced in the appendices to both petitioners' briefs (FLRA Pet. App. 27a-37a; NFFE Pet. App. 24a-36a).

STATEMENT

1. The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.* (FSLMRS) (Supp. II. 1996), establishes the right of federal employees to organize, select an exclusive representative, and engage in collective bargaining about a circumscribed range of topics. The FSLMRS requires the management officials of federal agencies to meet and bargain in good faith with the employees' chosen union for the purpose "of arriving at a collective bargaining agreement." 5 U.S.C. 7114(a)(4). The duty to bargain in good faith does not, however, extend to matters "inconsistent with any Federal law." 5 U.S.C. 7117(a)(1).

A refusal to negotiate in good faith is an unfair labor practice. 5 U.S.C. 7116(a)(5) and (b)(5). Under Sections 7105(a)(2)(G) and 7118(a)(6), the Federal Labor Relations Authority (FLRA or Authority) has jurisdiction to consider charges of unfair labor practices, and its final orders in such proceedings are

subject to judicial review "in the United States court of appeals in the circuit in which the [aggrieved] person resides or transacts business or in the United States Court of Appeals for the District of Columbia" (5 U.S.C. 7123(a)).

Unlike employees in the private sector, federal employees are forbidden to strike. Nonetheless, if good faith negotiations between a federal agency and a federal-sector union reach impasse, federal employees may take advantage of a statutory remedy that is not available to their private-sector counterparts: they may seek resolution of the parties' substantive disagreements from the Federal Services Impasses Panel. See 5 U.S.C. 7119; see also *Social Security Admin.* v. *FLRA*, 956 F.2d 1280, 1287 (4th Cir. 1992) (*SSA*). The Impasses Panel may "take whatever action is necessary and not inconsistent with [the FSLMRS] to resolve the impasse," such as imposing a union's proposals, in the course of binding arbitration, on the agency. 5 U.S.C. 7119(c)(5)(B) and (C). "A duty to bargain over a proposal, therefore, does more than simply require an agency to negotiate; it subjects the agency to the possibility that the proposal will become binding." *SSA*, 956 F.2d at 1282 (quoting *HHS* v. *FLRA*, 844 F.2d 1087, 1089 (4th Cir. 1988) (en banc)).

2. a. In 1985, the FLRA first considered whether the FSLMRS imposes on federal agencies a statutory duty to bargain with federal-sector unions, at the unions' initiative, during the course of an existing collective bargaining agreement. *Internal Revenue Serv.*, 17 F.L.R.A. 731, 736-737 (1985). The FLRA held that the statutory duty to bargain does *not* require agencies to engage in such "midterm" bargaining, because, among other considerations, such

bargaining would undermine workplace stability and discourage the parties from anticipating future issues when they engage in basic contract negotiations. *Ibid.*

On review, the D.C. Circuit invalidated the FLRA's position as contrary to the FSLMRS, holding that the statutory duty to bargain does extend to proposals made during the term of a collective bargaining agreement. *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU*). In reaching that conclusion, the D.C. Circuit relied on private-sector labor law precedent and on the FSLMRS's general purposes of strengthening the federal unions and encouraging collective bargaining. *Id.* at 300-301. On remand, the FLRA acquiesced in the D.C. Circuit's decision, see *SSA*, 956 F.2d at 1283, and held that the statutory duty to bargain in good faith "requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved." *Internal Revenue Serv.*, 29 F.L.R.A. 162, 166 (1987).

b. Several years later, in *SSA*, *supra*, the Fourth Circuit reviewed a federal agency's challenge to the FLRA's application of its new policy concerning union-initiated midterm bargaining. The Fourth Circuit found that policy inconsistent with the text, structure, and purposes of the FSLMRS. The court first explained that the language of that statute "strongly suggests that bargaining over midterm union proposals was not mandated by Congress," because "Congress addressed the duty to bargain in language that seems to contemplate that such a duty

arises as to only one, basic agreement," 956 F.2d at 1284, a position supported by the legislative history of the FSLMRS and by prior practice under a previously applicable Executive Order. *Id.* at 1284-1286. The Fourth Circuit also reasoned that reliance on private-sector labor practice would be "inappropriate" here. *Id.* at 1287. It observed that public-sector bargaining rights under the FSLMRS are more limited than those in the private sector, and that important "practical distinctions" between the two sectors—including the general availability of binding arbitration in the federal sector—bar application of private-sector principles to the question of public-sector midterm bargaining. *Ibid.* Finally, the court determined that union-initiated midterm bargaining would threaten the FSLMRS's underlying purposes by causing instability in labor-management relations and by discouraging comprehensive resolution of issues in the basic collective bargaining agreements themselves. *Id.* at 1288.

The Fourth Circuit recently revisited this area in *Department of Energy* v. *FLRA*, 106 F.3d 1158 (1997) (*DOE*). In that case, the union had proposed, in the course of bargaining over a basic collective bargaining agreement, the inclusion in that agreement of a clause that would have permitted it to make further substantive proposals during the course of the agreement and would have required the federal agency to bargain over such proposals. See *id.* at 1161. The parties failed to reach agreement on the midterm-bargaining clause, and, in binding arbitration, the Impasses Panel imposed the clause on the agency, principally on the theory that the clause simply restated the union's purported statutory right to insist on midterm bargaining. See *ibid.* After the

relevant agency head exercised his authority to disapprove the provision as contrary to law (see 5 U.S.C. 7114(c)), the union commenced an unfair labor practice proceeding, and the FLRA held that the agency had committed an unfair practice. *Department of Energy*, 51 F.L.R.A. 124 (1995). In so holding, the FLRA distinguished *SSA* as addressing only whether the FSLMRA mandates bargaining over union-initiated midterm proposals, not whether a contract provision requiring such bargaining is subject to compulsory negotiation and subsequent imposition by the Impasses Panel. *Id.* at 127-128.

The Fourth Circuit granted the agency's petition for review and denied enforcement of the FLRA's decision. *DOE*, *supra*. The court concluded that its *SSA* decision "compels the conclusion that a clause requiring an agency to engage in union-initiated midterm bargaining is inconsistent with the FSLMRA and, consequently, is not negotiable." 106 F.3d at 1163. Otherwise, the court reasoned, a union could "circumvent *SSA* by the mere expedient of negotiating to impasse on a midterm bargaining provision, essentially requiring an agency to bargain midterm over union proposals despite our determination that such a requirement is contrary to the FSLMRA." *Id.* at 1164. The court concluded that the agency was not required to negotiate over the clause.

3. a. This case involves a federal-sector union's efforts to include a "reopener clause," or midterm bargaining provision, in its collective bargaining agreement with the United States Geological Survey (Reston, Virginia), a subagency of the United States Department of the Interior. During negotiations, Local 1309 of the National Federation of Federal

Employees (NFFE) submitted the following proposal regarding "Union-initiated bargaining":

> The Union may request and the Employer will be obliged to negotiate on any negotiable matters not covered by the provisions of this agreement.

FLRA Pet. App. 14a. The Survey declared this proposal nonnegotiable based on the Fourth Circuit's decision in *SSA*. *Id.* at 15a. NFFE filed a charge with the FLRA alleging, *inter alia*, that the Survey had committed an unfair labor practice by refusing to negotiate over the proposal. *Id.* at 14a; see 5 U.S.C. 7116(a)(1) and (5).

The FLRA agreed that the Survey had committed an unfair labor practice, holding that the proposal was "substantially identical" to a midterm bargaining proposal that the FLRA had previously found negotiable, and that the proposal simply "reiterated a right the Union had under the Statute." FLRA Pet. App. 19a, 21a. The FLRA acknowledged the Fourth Circuit's holding in *SSA*, but restated its alternative position that *SSA* did not foreclose a union's right to insist on the inclusion of a midterm bargaining clause in an agreement with the agency employer. *Id.* at 20a. The FLRA thus ordered the agency to bargain over the proposal. *Id.* at 24a-25a.

b. The Fourth Circuit granted the Survey's petition for review of the FLRA's decision and denied the FLRA's cross-application for enforcement. FLRA Pet. App. 3a. The court first noted that in *DOE* it had held that "not only is union-initiated midterm bargaining not mandated by the FSLMRA, but [it is] also * * * *contrary* to the FSLMRA." *Id.* at 7a (quoting *DOE*, 106 F.3d at 1163). The court then concluded that its prior precedents in *SSA* and *DOE* controlled

this case. Although *DOE* involved a midterm bargaining requirement actually imposed by the Impasses Panel, the court determined that this distinction was "not critical" because "[t]he same practical consequences flowing from the impasse procedures that made the distinction between a statutory requirement and general duty to bargain of no consequence in [*DOE*] obtain here." *Id.* at 9a. Holding that union-initiated midterm bargaining proposals are negotiable, the court reasoned, would enable a union to circumvent *SSA* by negotiating such a proposal to impasse, at which point the Impasses Panel (which follows the FLRA's views on midterm-bargaining obligations) would normally impose the proposal on the parties in binding arbitration. *Ibid.* Although the court acknowledged that "an additional step in the analysis is necessary" to reach that conclusion, it rejected petitioners' efforts to distinguish *SSA* and *DOE* on the ground that "a duty to bargain is different for the purpose at hand from a duty to bargain about whether to bargain." *Id.* at 9a-10a.[1]

ARGUMENT

Although the Fourth Circuit and the District of Columbia Circuit have diverged on whether, in a limited class of cases, the FSLMRS compels a federal agency to engage in midterm bargaining at the initiative of a federal sector union, that issue is neither squarely presented by these petitions nor sufficiently important to warrant this Court's review.

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[1] We have been informed that the parties are currently renegotiating their collective bargaining agreement. There is no indication that the new negotiations will resolve the parties' present dispute.

1. The specific dispute in this case is whether a union may force an agency to negotiate about whether to include, in a collective bargaining agreement, a reopener clause that would compel the agency to engage in midterm bargaining. Petitioners present the question whether such negotiation is required as separate from, and susceptible to resolution independently of, the fundamental statutory question that has divided the Fourth and D.C. Circuits: whether the FSLMRS itself requires an agency to engage in midterm bargaining at the initiative of a public-sector union. See FLRA Pet. 19-26; NFFE Pet. 16-18.[2]

As discussed below, the Fourth Circuit correctly reasoned that if compulsory, union-initiated midterm bargaining is inconsistent with the FSLMRS, then agencies may not be compelled to negotiate about whether to commit themselves to such bargaining. Nonetheless, because petitioners reject that analysis, and because they frame their proposed duty to bargain about reopener clauses as independent of any statutory duty to engage in midterm bargaining, this case

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[2] The FLRA acknowledges (Pet. 15 n.4) that it "did not argue in the instant case * * * that a union's proposal for midterm bargaining was negotiable because it restated a statutory obligation. Instead the Authority pressed only its alternative argument that, apart from any statutory duty to bargain midterm, a contract provision requiring midterm bargaining is not inconsistent with either applicable law or regulation." (Petitioner NFFE urged the court to overrule *SSA* and recognize a statutory duty to bargain midterm, but only in a reply brief filed at the close of briefing. See Intervenor Cross-Reply Br. 5-6 (July 3, 1997).) There is thus a substantial threshold question about whether the FLRA has adequately preserved its challenge to the Fourth Circuit's previously articulated position that the FSLMRS imposes no duty to engage in midterm bargaining.

does not squarely present the issue on which the circuits have split. Instead, as presented by petitioners, this case is greatly complicated by a variety of threshold issues arising under the FSLMRS, including how an agency's duty to negotiate is related to the permissible subjects of binding arbitration before the Impasses Panel, as well as the degree of certainty that, in any given case, the Impasses Panel will in fact impose proposed reopener clauses on non-consenting agencies. See, *e.g.*, FLRA Pet. 22-26; FLRA Pet. App. 8a-12a.

Moreover, the dispute between the parties, as petitioners have framed it, could be resolved without deciding the question that has divided the Fourth and D.C. Circuits. Under petitioners' analysis, if this Court were to hold that an agency must *negotiate* about whether to engage in later midterm bargaining, it would not necessarily resolve more fundamental questions (which were squarely presented and decided in *SSA* and *NTEU*) concerning any statutory right of unions to engage in actual midterm bargaining.[3] This case is therefore poorly suited for addressing the circuit conflict on those questions. Even if resolution of that conflict were otherwise warranted, the Court should await a case squarely presenting whether an agency must engage in midterm bargain-

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[3] Of course, in the broader of its two claims, which it did not present in the court of appeals (see note 2, *supra*), the FLRA reasons that an agency must bargain about a midterm-bargaining proposal precisely because, in its view, such a proposal "merely restates an agency's statutory obligation" to engage in midterm bargaining. FLRA Pet. 14. Under petitioners' analysis, however, this Court would not need to adopt that broader rationale even if it were to rule in the FLRA's favor.

ing, not (as here) whether an agency must negotiate about whether to engage in such bargaining.

2. In any event, the conflict in the circuits does not have enough practical significance to warrant this Court's review. First, the D.C. Circuit has substantially restricted the scope of the midterm bargaining right that it recognized in *NTEU*. As a matter of statutory interpretation, the FLRA has held that an agency's midterm bargaining obligation does not extend to matters that are "covered by" or "contained in" the parties' collective bargaining agreement. See *Marine Corps Logistics Base, Barstow, Cal.*, 39 F.L.R.A. 1126, 1132 (1991); *Internal Revenue Serv.*, 29 F.L.R.A. at 166; see also NFFE Pet. 13. In *Department of the Navy* v. *FLRA*, 962 F.2d 48 (1992), the D.C. Circuit expansively construed the scope of matters "covered by" an existing agreement, thereby limiting the circumstances in which the *NTEU* decision would require an agency to engage in midterm bargaining—and thereby also limiting the cases implicated by the D.C. Circuit's disagreement with the Fourth Circuit. Indeed, while the D.C. Circuit noted that it remained "bound by the result reached in *NTEU*," 962 F.2d at 54 n.3, it repeatedly emphasized its reliance on the same policy considerations that supported the Fourth Circuit's decision in *SSA*. See *id.* at 54 n.3, 55 n.6, 59 n.12.

In addition, it is in fact quite uncommon for agency employers and federal-sector unions to seek judicial resolution of disputes about the availability of midterm bargaining. Indeed, there are only a few judicial decisions addressing such disputes, and the present circuit conflict, which first arose in 1992, remains confined to the Fourth and D.C. Circuits. At some future date, the issue underlying that conflict may

assume enough practical significance to necessitate this Court's review. If so, however, there will be additional, and more appropriate, opportunities for addressing it.

3. Finally, the Fourth Circuit's decision was correct on the merits. Unlike the National Labor Relations Act, which specifically addresses a private employer's duty to engage in midterm bargaining, see 29 U.S.C. 158(d), the FSLMRS contemplates only one circumstance in which an agency-employer will be required to bargain during the term of a collective bargaining agreement: where the agency initiates changes in the conditions of employment (5 U.S.C. 7106(b)(2) and (3)). As the *SSA* court observed, "[a]lthough Congress was surely aware that union-initiated midterm bargaining was an available option, it chose language that appears to exclude that possibility. The statutory assumption seems to have been that of one comprehensive agreement that serves to ensure workplace stability during its designated term." 956 F.2d at 1284.

Indeed, a requirement that a federal agency engage in midterm bargaining, whether imposed as a matter of statutory construction or through binding arbitration, would pose a unique set of problems that would threaten the stability of federal labor relations. Such a requirement would create an incentive for unions to "gain a tactical advantage by negotiating—and then arbitrating—issues seriatim rather than as a unified package." *SSA*, 956 F.2d at 1287. That incentive is uniquely powerful in public-sector collective bargaining under the FSLMRS, which, unlike private-sector bargaining, is generally subject to impasse procedures in which a union proposal may be forced upon the agency. Thus, union-initiated midterm bargain-

ing "risks serious interference" with the labor statute's objective of effective and efficient government by diminishing the parties' ability to rely on the collective bargaining agreement as a stable foundation for daily relations, and by discouraging the parties from resolving issues in a comprehensive manner. *Id.* at 1288.

Moreover, the Fourth Circuit correctly concluded that acceptance of the FLRA's contrary position in this case would be inconsistent with this statutory scheme. First, "[n]ot only is union-initiated midterm bargaining not mandated by the FSLMRA, but it is also *contrary* to the FSLMRA," and an employer therefore has no duty to bargain about it. FLRA Pet. App. 7a (internal brackets and ellipsis omitted); see also *Indiana Air Nat'l Guard* v. *FLRA*, 712 F.2d 1187, 1189 n.1 (7th Cir. 1983). Second, compelling an agency to negotiate over a particular proposal "subjects the agency to the possibility that the proposal will become binding" through impasse procedures. *HHS* v. *FLRA*, 844 F.2d at 1089. (Indeed, petitioners cite only one case (see FLRA Pet. 24) in which the Impasses Panel has *not* resolved a disagreement about a proposed "reopener clause" by imposing such a clause on the agency employer.) Thus, the FLRA's position in this case—that federal agencies must bargain over proposed reopener clauses that would require midterm bargaining—would generally permit unions to obtain the same unilateral right to compulsory midterm bargaining that the *SSA* court correctly found inconsistent with the text and structure of the FSLMRS.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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